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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 675.

AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

—against—

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

Application of City Investing Company and 165 Broadway Building, Inc. re Preferred or Trust Claims against the Defendant and/or its Receiver.

CITY INVESTING COMPANY,
Petitioner,

—against—

165 BROADWAY BUILDING, INC., and THE CITY OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CETIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ELMER O. GOODWIN,
Counsel for Petitioner.

EDWARD F. CLARK,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. .

AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

—against—

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

Application of City Investing Company and 165 Broadway Building, Inc. re Preferred or Trust Claims against the Defendant and/or its Receiver.

CITY INVESTING COMPANY,
Petitioner,

—against—

165 BROADWAY BUILDING, INC., and THE CITY OF NEW YORK,
Respondents.

Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

PRELIMINARY AND JURISDICTIONAL STATEMENT.

Petitioner, City Investing Company, by its counsel, prays that a writ of certiorari issue to review a decision of the United States Circuit Court of Appeals for the Second Circuit, rendered June 2, 1941, reversing an order (R. 8-10) of the United States District Court for the Southern District of New York in favor of petitioner, which confirmed the report of a Special Master appointed by said District Court (R. 16-50). Petition for rehearing was denied and order for mandate made on July 8, 1941 (R. 246-247).

The jurisdiction of this Honorable Court is invoked under

Section 240(a) and Subsection 8(a) of the Judicial Code, as amended, Title 28 U. S. C., Sections 347 and 350, and Supreme Court Rule 38, par. 5(b).

Summary Statement.

The subject matter of the litigation involves the conflicting claims of the petitioner (R. 66-74), and of the respondent, 165 Broadway Building, Inc. (R. 60-65), asserted against the Receiver of Interborough Rapid Transit Company (hereinafter called the Railway Company), in federal equity receivership proceedings entitled "American Brake Shoe and Foundry Company, plaintiff, against Interborough Rapid Transit Company, defendant". The respective claims are based upon a contract of 1907 entered into between the Railway Company and Broadway-Cortlandt Company, the then owner of premises in the City of New York, known as 165 Broadway, pursuant to which the Railway Company obtained the right to make connection from its elevated structure and station platform with said premises, and Broadway-Cortlandt Company deposited with the Railway Company the sum of $10,000 for payment of the salary of a ticket chopper, and also expended the sum of $13,557.15 as the cost of constructing certain bridges, structures and connections from the elevated railway to the premises in question, which sums were to be repaid by the Railway Company upon discontinuance of said connection of its elevated railway structure with said premises (R. 176-186).

The elevated structure and railway was demolished and the connection between the building and said railway structure discontinued and removed in April 1939 (R. 22).

Petitioner is the assignee of Broadway-Cortlandt Company in and to its rights to receive the repayment of the moneys in question (R. 68, 72). Petitioner, being also a former owner of said premises, as grantee of Broadway-Cortlandt Company, expressly reserved its rights to receive

said moneys when it subsequently conveyed the real property (R. 69, 72).

165 Broadway Building, Inc. (hereinafter referred to merely as "the respondent") is a subsequent grantee of said premises, deriving title through a mortgagee who, as the Special Master found, acquired its lien upon the premises with notice, actual or constructive, of petitioner's rights and of its express reservation of such rights in and to the funds in dispute (R. 44).

Neither the Receiver, nor the City of New York, which is taking over the receivership estate, subject to the obligation of paying allowed claims, is now concerned in this litigation, being willing to pay the moneys in dispute to the person determined entitled thereto (R. 212). The sole question involved, therefore, is the right to receive payment as between the petitioner and respondent.

The report of the Special Master awarded payment of the moneys to petitioner (R. 49-50), which report was confirmed by order of the District Court (R. 8-10). The Circuit Court of Appeals, in reversing the District Court, has held that respondent, 165 Broadway Building, Inc., is entitled to receive payment of said moneys (R. 223).

Questions Presented and Reasons for the Allowance of the Writ.

Question 1. Whether the decision of the court below, holding that the right to receive payment from the railway Company was not an affirmative covenant, personal in nature, but was, on the contrary, a real covenant running with the land, is in conflict with the law of the State of New York, established by its highest court.

Reasons: The decision of the court below is directly contrary to an analogous decision by the Court of Appeals of the State of New York in *Meado-Lawn Homes, Inc.* v. *Westchester Lighting Co.*, 171 Misc. 669, 13 N. Y. S. (2d) 709, affirmed 259 App. Div. 810, 20 N. Y. S. (2d) 396,

affirmed without opinion 284 N. Y. 667, 30 N. E. (2d) 608 (1940), reaffirming the New York rule as to personal, affirmative covenants of this nature as established in *Cole* v. *Hughes*, 54 N. Y. 444, 13 Am. Rep. 611, and similar cases.

The court below admits that the New York law has always been contrary to the running of such a covenant (R. 216-217), but bases its decision upon the contention that the New York law in that respect has been changed by the decision of the New York Court of Appeals in *Neponsit Property Owners' Association* v. *Emigrant Industrial Savings Bank*, 278 N. Y. 248, 15 N. E. (2d) 793 (1938). As appears under Point I of petitioner's brief, the court below has misconstrued and misinterpreted the scope and extent of the *Neponsit* case, *supra*, and has disregarded the applicable rule of law as established by the *Meado-Lawn* case, *Cole* v. *Hughes*, *supra*, and other New York cases.

QUESTION 2. Whether the decision of the lower court is in conflict with the law of the State of New York, as established by its highest court, that respondent was chargeable with notice of the complete and effective reservation by petitioner of all rights to receive repayment of the moneys from the Railway Company.

REASONS: Petitioner's title is derived by express assignment of the rights of the party originally contracting with and who made the payments to the Railway Company. In addition, after acquiring the real property from said company, petitioner, upon a subsequent conveyance of the premises, effectively reserved its rights in and to the moneys in question by express reservation in its contract of sale (R. 170). Such reservation, relating merely to a chose in action, was naturally omitted from petitioner's deed to its grantee, but an agreement was entered into at the time of delivery of said deed, stating in substance (R. 172) that the subject clauses contained in the

contract should not be deemed merged in the deed. Respondent derives title through a mortgagee, who loaned money and consolidated the new loan and other mortgages into a consolidated mortgage, under an agreement made with the mortgagor, that said mortgage should be "Subject, however, * * * to agreements relating to maintenance of elevated station * * *" (R. 193). The deed into said mortgagor conveyed the premises "Subject to * * * unrecorded agreements affecting said real estate * * *" (R. 192). Such references were found by the Special Master to refer to petitioner's reservation and to put respondent on notice thereof (R. 44). The decision of the Circuit Court to the contrary (R. 221-222) is in conflict with the rule of constructive notice as established by the highest New York court in *Sweet* v. *Henry*, 175 N. Y. 268, 67 N. E. 574, and other cases referred to in Point II of the annexed brief. Moreover, the decision of the court below, in so far as it holds that the rights of petitioner could not be effectively reserved, is not only in conflict with the New York law of personal covenants, but also the rule established by the New York Court of Appeals in *Drucker* v. *Manhattan Railway Co.*, 213 N. Y. 543, 108 N. E. 74, and related cases.

Question 3. Whether the decision of the lower Court is also in conflict with the long standing rule of law in New York State, as established by its highest court, that a subsequent grantee, in order to rely upon the protection of the Recording Act, must sustain the affirmative burden of proving that he is a purchaser in good faith and without notice.

Reasons: The New York rule, as established by the case of *Hood* v. *Webster*, 271 N. Y. 57, 2 N. E. (2d) 43, and many earlier New York cases, imposed upon the respondent the burden of proving affirmatively that its title was acquired in good faith and without notice, actual

or constructive, of the rights of petitioner. No such proof was given or offered by respondent in the hearing before the Special Master. The holding of the court below to the contrary is, therefore, in conflict with the established law of the State of New York.

It is submitted that each of the questions set forth above involves a local rule of property of the State of New York on matters of general importance, affecting titles to real property in that state, and requiring adherence thereto by the federal courts. *Tyler* v. *U. S.*, 281 U. S. 497, 74 L. Ed. 991; *Edward Hines Trustees* v. *Martin*, 268 U. S. 458, 69 L. Ed. 1050; *Warburton* v. *White*, 176 U. S. 484, 44 L. Ed. 555; *Erie Railway Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals of the Second Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 291, American Brake Shoe and Foundry Company, plaintiff, against Interborough Rapid Transit Company, defendant; subtitle, 165 Broadway Building, Inc., appellant, against City Investing Company, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, New York City, October 1, 1941.

ELMER O. GOODWIN,
Counsel for Petitioner.

EDWARD F. CLARK,
Of Counsel.